664 (7)

No. 05-1575

In The
Supreme Court of the United States

DORA B. SCHRIRO, et al.,

Petitioners,

vs.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' BRIEF ON THE MERITS

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CAPITAL CASE
QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim asserting that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, Landrigan would have cooperated in presenting that type of evidence.

1. In light of the highly deferential standard of review required under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation evidence and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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OPINIONS BELOW

An *en banc* panel of the United States Court of Appeals for the Ninth Circuit held that Landrigan established a colorable claim of ineffective assistance of counsel entitling him to an evidentiary hearing in district court. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (Pet. App. A.) The *en banc* ruling reversed a unanimous three-judge Ninth Circuit panel decision that had upheld the district court's judgment denying federal habeas relief. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (panel decision) (Pet. App. B); *Landrigan v. Stewart*, No. CIV-96-2367-PHX-ROS (D. Ariz. Dec. 15, 1999) (Pet. App. C). *See also State v. Landrigan*, 859 P.2d 111 (Ariz. 1993) (J.A. at 53).

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 8, 2006. Petitioners timely filed a petition for writ of certiorari, which this Court granted on September 26, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. Respondent Jeffrey Landrigan is on death row in Arizona for a first-degree murder he committed in December of 1989. (J.A. at 54.)

In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1986 prison stabbing. (*Id.* at 56; Pet. App. B at 2.) Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to "pick up" men by showing them money. (J.A. at 54.)

On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." (*Id.*) The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. (*Id.*)

At some point after the phone conversations, Landrigan stabbed the victim and strangled him to death with an electrical cord. Landrigan left the victim face down on the bed in a pool of blood with facial lacerations and puncture wounds on his body. (*Id.* at 55.) An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. (*Id.*)

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However,

he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on one of Landrigan's shoes matched blood on the victim's shirt. (*Id.* at 55-56.)

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. (*Id.* at 56.)

2. After a jury convicted Landrigan of murder, burglary and theft, the trial court considered evidence of aggravating and mitigating circumstances. The State established two statutory aggravating circumstances: (1) Landrigan's prior conviction of a felony involving the use or threat of violence; and (2) commission of the murder for pecuniary gain. (*Id.*) Defense counsel presented a sentencing memorandum detailing evidence of Landrigan's long history of drug abuse as possible mitigation, but Landrigan impeded counsel's efforts to develop other potentially mitigating evidence. (*Id.* at 66-67; Pet. App. D at 4-21.)

Landrigan's counsel subpoenaed Landrigan's biological mother and his ex-wife to testify at the sentencing hearing. However, Landrigan instructed them not to cooperate or testify. (Pet. App. D at 2.) When counsel attempted to put on the record the type of mitigation evidence he planned to elicit from Landrigan's family members, Landrigan repeatedly interrupted and

undermined counsel's efforts to portray Landrigan in a favorable light. (*Id.* at 5-9.)

Counsel attempted to soften the fact that Landrigan had previously murdered his best friend, Greg Brown, suggesting that the murder had elements of self-defense. Counsel stated that Landrigan was walking away when Brown, a much larger man, rushed up and attacked him. Counsel indicated that Landrigan, who happened to be carrying a knife, defended himself and unfortunately, killed Brown. (*Id.* at 8-9.) Landrigan interrupted, however, and made clear that his attorney was not telling the story correctly. Landrigan stated, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." (*Id.* at 9.)

Landrigan similarly interjected himself when counsel tried to couch Landrigan's assault on another inmate as self-defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan stated, "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." (*Id.*)

Landrigan again interrupted when counsel tried to burnish Landrigan's troubled past by indicating that before Brown's murder, Landrigan, for at least some period of time, was a "loving, caring husband," who was taking care of his wife and her child by working at a golf course during the year-and-a-half preceding the killing. Landrigan explained: "Well, I wasn't just working. I was

doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first [expletive]ing place?" (*Id.* at 7.)

Finally, when the court asked Landrigan if he wanted to say anything in his own behalf, he stated:

> Yeah. I'd like to point out a few things about how I feel about the way this [expletive], this whole scenario went down. I think that it's pretty [expletive]ing ridiculous to let a fagot [sic] be the one to determine my fate, about how they come across in his defense, about I was supposedly [expletive]ing this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(*Id.* at 16.)

The trial court considered the information presented at the sentencing hearing, as well as defense counsel's sentencing memorandum, then found as mitigation that Landrigan loved his family and his family loved him, and that the jury had not found premeditation. The court ruled, however, that the mitigation was insufficient to warrant leniency, and imposed a death sentence. The court stated:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and

> the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

(*Id.* at 23.) The court also imposed a 20-year prison term for the burglary conviction and 6 months in jail for theft. (*Id.* at 24.)

Landrigan appealed his convictions and sentences to the Arizona Supreme Court. The court denied the appeal and upheld Landrigan's death sentence after independently reviewing the aggravating and mitigating circumstances. (J.A. at 62-67.)

3. In January of 1995, Landrigan filed a petition for post-conviction relief raising several claims, including one that his trial counsel was ineffective at sentencing for failing to present mitigating evidence. Landrigan submitted an affidavit stating that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that type of evidence to be presented. (Pet. App. E at 1-2.) His affidavit did not allege, however, that he did not understand the general concept of mitigation or that he would have permitted presentation of any other type of evidence. (*Id.*)

The same judge who sentenced Landrigan considered and rejected the post-conviction claim, holding that it was both frivolous and precluded.[1] (Pet. App. F at 3-5.) The

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[1] The basis of the preclusion ruling was that Landrigan had raised another claim of ineffective assistance of counsel at sentencing on direct appeal. (Pet. App. F at 5.) Although Petitioners initially asserted a procedural bar regarding this claim in federal court, they did not challenge the district court's ruling that the claim is not procedurally barred.

judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." (*Id.* at 4.) The judge denied Landrigan's motion for rehearing, and the Arizona Supreme Court denied Landrigan's petition for review from that ruling. (Pet. App. A at 6.)

4. In October of 1996, Landrigan filed a preliminary petition for writ of habeas corpus and application for appointment of counsel, then filed an amended petition on July 31, 1997. The amended petition included a claim that counsel was ineffective at sentencing for not presenting evidence regarding a biological component underlying Landrigan's history of violence. (*Id.* at 6; J.A. at 126-27.)

While the federal habeas petition remained pending, Landrigan filed a successive petition for post-conviction relief in state court, again asserting a claim of ineffective assistance of counsel. As part of the pleadings submitted, Landrigan's counsel included a report prepared by a psychological expert, Mickey McMahon, Ph.D., prior to sentencing.[2] (J.A. at 129.) Landrigan argued that the report should have led counsel to do more investigation and thus was evidence of ineffective assistance. *See* Petition for Post-Conviction Relief, dated Aug. 24, 1999, at 36-37. However, the report, dated July 15, 1990, detailed

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[2] Dr. McMahon interviewed Landrigan, who stated that he and a partner went to the victim's residence to rob him, and when the victim made homosexual advances, Landrigan hit him, then let his partner into the residence. His partner began kicking the victim, and when the victim tried to get up, Landrigan put the victim in a headlock and his partner hit the victim until he was unconscious. Landrigan further stated that he went back to robbing the residence while his partner took an electric cord and choked the victim to death. (J.A. at 135.)

Landrigan's background, including information about his biological parents and adoptive parents and the difficulties Landrigan experienced during childhood. (J.A. at 129-38.) Thus, the report demonstrated that, prior to sentencing, counsel had consulted with an expert and had mitigation-type information that could have been presented had Landrigan permitted counsel to do so.

The trial court denied Landrigan's successive petition for post-conviction relief on September 15, 1999, on the basis of preclusion because the claims could have been raised previously.

On December 15, 1999, the federal district court rejected Landrigan's ineffective assistance of counsel claim and denied his petition. In rejecting the claim, the district court bypassed the deficient performance prong of the *Strickland* analysis[3], and found that Landrigan "failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence." (Pet. App. C at 22.) After reviewing the evidence Landrigan claimed should have been presented, the district court concluded that Landrigan failed to demonstrate a reasonable probability that the result of the proceeding would have been different. (*Id.*) The district court rejected as unnecessary Landrigan's request for an evidentiary hearing and denied the petition. (*Id.* at 47, 49.)

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[3] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687.

Landrigan appealed that ruling to the Ninth Circuit, and a unanimous three-judge panel upheld the district court. (Pet. App. B at 15.) In rejecting Landrigan's ineffective assistance of counsel claim, the panel noted that, under *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Id.* at 7.) The panel observed that, although there may be close cases in terms of the reasonableness of counsel's actions or inactions in light of the defendant's actions, this was not one of them:

> [O]ur ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

(*Id.* at 8.) The panel thus concluded that Landrigan failed to establish a basis for relief:

> When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 869 P.2d at 118. He does say that he would

> have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

(*Id.* at 15.)

The Ninth Circuit agreed to consider the case *en banc*, however, and subsequently withdrew the unanimous panel decision. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005). An *en banc* majority reversed, holding that Landrigan had alleged a colorable claim for relief and was entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. (Pet. App. A at 21.)

The majority concluded that Landrigan had only waived presentation of testimony by two family members, and that he had not waived other mitigation because, "due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object." (*Id.* at 15.) The majority further concluded that the Arizona Supreme Court (on direct appeal) and the Arizona Superior Court (on collateral review) incorrectly concluded that Landrigan had waived all mitigation because those courts had taken Landrigan's colloquy with the sentencing judge out of context. (*Id.* at 15-16.)

The majority further ruled that, even overlooking the state post-conviction court's "flawed factual finding that Landrigan unequivocally waived presentation of all

mitigating evidence," the state court's conclusion that Landrigan's claim was frivolous was an unreasonable application of this Court's precedent because the record did not establish that Landrigan's decision to waive mitigation was informed and knowing. (*Id.* at 16-17.)

Two judges dissented, finding that Landrigan failed to allege facts that, if proven, would demonstrate prejudice under *Strickland*. The dissenters noted in particular the majority's acknowledgment that "all the mitigating circumstances Landrigan faults counsel for not raising 'converge' to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions." (*Id.* at 22 n.1.) The dissent concluded that, because Arizona courts have ruled that an antisocial personality disorder diagnosis is not compelling mitigation evidence, Landrigan had not alleged facts that, if proven, would create an objectively reasonable probability of a different sentence. (*Id.* at 27.)

Petitioners sought certiorari review in this Court, which the Court granted on September 26, 2006.

SUMMARY OF ARGUMENT

The Ninth Circuit failed to accord proper deference to the state court's factual findings, as well as the state court's application of this Court's precedent in cases decided under the AEDPA's amendments to 28 U.S.C. § 2254. The Ninth Circuit erred by failing to defer to the state court's factual finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." The Ninth Circuit further erred by finding that the state court's ruling rejecting Landrigan's ineffective

assistance of counsel claim unreasonably applied this Court's *Strickland* jurisprudence.

The Ninth Circuit's conclusion that the state court unreasonably determined the facts by finding that Landrigan waived presentation of mitigation evidence does not survive scrutiny under any standard of review, much less the highly deferential standard under the AEDPA. The state court record includes an on-the-record colloquy between Landrigan and the trial court in which Landrigan affirmed that he had instructed his lawyer not to present evidence of mitigating circumstances. The record further establishes that when Landrigan's trial counsel tried to make a record of the type of evidence he had intended to present in mitigation, Landrigan repeatedly interrupted and actively undermined counsel's efforts to present Landrigan's background in a more favorable light. The evidence fully supports the state court's factual finding that Landrigan affirmatively waived presentation of any mitigation.

The Ninth Circuit further erred by finding that the state court's rejection of Landrigan's ineffective assistance of counsel claim was contrary to, or involved an unreasonable application of, clearly established federal law. The state courts resolved Landrigan's ineffective assistance of counsel claim consistent with decisions from this Court, including *Strickland*, 466 U.S. at 691 (the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"), and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (affirming a defendant's right to decide whether to present mitigation evidence in a capital case). Thus, the state court's ruling that Landrigan's express waiver of mitigation renders his ineffective assistance of

counsel claim "frivolous" was not an unreasonable application of clearly established federal law.

ARGUMENTS

I. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Rejected the State Court's Factual Finding that Landrigan Instructed His Defense Attorney not to Present any Mitigating Evidence.

Under 28 U.S.C. § 2254(d), which codifies the AEDPA amendments to the federal habeas statute, a habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95 (2002). Under 28 U.S.C. § 2254(e)(1), factual determinations by a state court are presumed correct, and a habeas petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence.

Even prior to the enactment of the AEDPA, state court factual findings were entitled to a "high measure of deference" requiring that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. "Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). With the enactment of § 2254(e), Congress clarified the

burden of proof the habeas petitioner bears in challenging the state court's factual findings. *See Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (habeas petitioner must show that a state court's factual finding was incorrect by clear and convincing evidence, and that the corresponding factual determination was objectively unreasonable in light of the record before the court).

In the instant case, the Ninth Circuit ruled that the state court's finding that Landrigan instructed his defense attorney not to present any mitigating evidence was an "unreasonable determination of the facts." (Pet. App. A at 15-16.) However, the Ninth Circuit failed to accord the deference that should be afforded state court factual findings, and the ruling does not withstand scrutiny.

At the sentencing hearing, the trial court engaged in the following colloquy with Landrigan:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> THE DEFENDANT: Not as far as I'm concerned.

(Pet. App. A at 14-15; Pet App. D at 3-4.) That colloquy clearly establishes a basis for the state court's finding that "[Landrigan] instructed his defense attorney not to bring any mitigation to the attention of the court." (Pet. App. F at 4.)

The Ninth Circuit nevertheless posits that Landrigan's comments were taken out of context, and that the remainder of the transcript compels the conclusion that Landrigan was saying something other than that he wanted to waive presentation of any potential mitigation evidence. Instead, Landrigan may have wanted only to waive presentation of testimony from family members. (Pet. App. A at 12-16.) However, far from supporting the Ninth Circuit's conclusion, the context of Landrigan's statements confirms that Landrigan was not cooperating with counsel's attempt to develop mitigation and that he did not want *any* mitigating evidence presented, including expert testimony.

Immediately before Landrigan's acknowledgment that he did not wish counsel to present mitigating circumstances, Landrigan's counsel informed the trial court that he had intended to present testimony from Landrigan's natural mother and Landrigan's ex-wife, but that Landrigan had objected. (Pet. App. D at 2-4.) Immediately after Landrigan's express waiver, counsel suggested that the court question the two proposed witnesses to see if they would testify. (*Id.* at 4.) After they stated they would not testify because of Landrigan's wishes, counsel asked for permission to relate what counsel had expected to elicit from the proposed witnesses. The court agreed, and counsel then tried to make a record of information that could be construed to be mitigating. (*Id.* at 5-6.) At that point, as outlined previously,

Landrigan repeatedly interrupted and thwarted counsel's efforts to portray him in a more favorable light. (*Id.* at 5-12.) At one point, Landrigan even stated:

> THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

(*Id.* at 6.)

After Landrigan's counsel tried to make a record of the information the witnesses would have provided, counsel explained that he had been unable to develop evidence relating to Landrigan's mental health because Landrigan and his family members declined to provide information from which an expert might be able to provide a diagnosis. (*Id.* at 10-12.) Counsel indicated that he was aware of some type of drug use by Landrigan's natural mother during pregnancy, but that he needed additional information regarding what particular drugs had been used and for how long. (*Id.*) Counsel explained that, without that type of information, he would be unable to obtain expert testimony regarding the effect of *in-utero* drug use. (*Id.*) Counsel also indicated that he could have had a psychiatrist or psychologist "standing in the wings to testify." (*Id.* at 12.)

The Ninth Circuit's conclusion that Landrigan only wanted to exclude testimony from his relatives fails because Landrigan objected not only to testimony from his natural mother and his ex-wife, but also to information presented by counsel. Thus, Landrigan's objection to mitigation evidence was not limited to testimony from his family members. Moreover, Landrigan, who was obviously

capable of speaking for himself and had no qualms about addressing the court directly, did not interject at any point to say that his only objection was to testimony from family members.

Furthermore, in the affidavit Landrigan submitted as part of his first state post-conviction proceeding, he avowed only that he would have permitted testimony regarding a biological component to violence in his family. He made no such avowal regarding any other type of mitigating evidence.

The Ninth Circuit exceeded the scope and substance of the limited review available under the AEDPA, and effectively substituted its own unsupported view of the evidence for the fully-supported view of the trial court. Defense counsel's statements and avowals, and those of Landrigan himself, provide a more than ample basis for the trial court's finding that Landrigan sought to exclude consideration of *all* mitigation evidence, and not merely testimony from his family members.

A federal reviewing court does not enjoy the prerogative of rejecting a state court's decision unless that decision rests on an unreasonable determination of the facts. *See Buckner v. Polk*, 453 F.3d 195, 204 n.8 (4th Cir. 2006) (recognizing that, "under the AEDPA, our task is not to decide the credibility issue de novo, but to determine whether [the defendant] has produced clear and convincing evidence that the [state] court's resolution of [credibility assessments underlying the prejudice prong of

the *Strickland* analysis] was incorrect"). Here, the state court's decision denying post-conviction relief rested on a reasonable determination of the facts and has not been rebutted by clear and convincing evidence. Accordingly, the Ninth Circuit erred in its *en banc* opinion by rejecting the state court's finding that Landrigan waived presentation of mitigation evidence.

II. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Found that the State Court's Ruling was an Unreasonable Application of Clearly Established Federal Law.

The Ninth Circuit failed to accord proper deference under Section 2254(d) to the state court's resolution of Landrigan's ineffective assistance of counsel claim. The Ninth Circuit's conclusion that the state court unreasonably applied *Strickland* is flawed because there is no source in this Court's case law for the proposition that the defendant cannot waive presentation of mitigating evidence, and because there is no precedent from this Court suggesting that the amount of information provided to Landrigan prior to his waiver was inadequate. *See Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (holding that under 28 U.S.C. § 2254(d)(1), clearly established federal law means case law from this Court).

The state court's decision is entirely consistent with this Court's decisions addressing a defendant's right to waive mitigation and with this Court's *Strickland* jurisprudence. The same judge who sentenced Landrigan considered his post-conviction petition and applied *Strickland* in addressing Landrigan's ineffective assistance of counsel claim. (Pet. App. F at 3-4.) In rejecting the claim as "frivolous," the court noted that

"[s]ince defendant instructed his attorney not to present *any* evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing." (*Id.* at 4, emphasis in original.) The court further noted that Landrigan's assertion in an affidavit that he would have permitted some type of mitigation to be presented was neither credible nor consistent with his statements at sentencing. (*Id.*)

In *Strickland*, this Court held that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Reviewing courts must evaluate counsel's conduct in light of "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Here, because Landrigan chose not to present mitigation, he cannot establish deficient performance by counsel or resulting prejudice. Accordingly, the state court's resolution of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of *Strickland*. *See Coleman v. Mitchell*, 244 F.3d 533, 544-46 (6th Cir. 2001) (holding that a capital defendant's counsel is not constitutionally ineffective when a competent defendant prevents the investigation and presentation of mitigation evidence).

Contrary to the Ninth Circuit's conclusion, Landrigan's understanding of the nature of mitigation evidence is not at issue. Landrigan's post-conviction affidavit did not avow or even suggest that he did not understand the concept of mitigation. It asserts only that he would have permitted his attorney to present one particular type of mitigation evidence if his attorney had asked him. (Pet. App. E at 2.)

Mitigation evidence is broadly defined. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (noting that the sentencer in a capital case should "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."). Thus, a defendant pursuing post-conviction relief can always identify an additional item of mitigation that his attorney could have investigated and presented. However, identifying additional mitigation evidence does not, without more, establish ineffective assistance. *See, e.g., Buckner,* 453 at 204-05.

When a defendant chooses to waive presentation of mitigation, defense counsel is well-advised to explain mitigation and provide examples of what might constitute mitigation. *See Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993) (announcing prospective rule in Florida requiring that when a defendant refused to present mitigation evidence, counsel must inform the court of the defendant's decision and indicate whether, based on counsel's investigation, counsel reasonably believes there to be mitigating evidence and what that evidence would be). *See also Hawkins v. Mullin*, 291 F.3d 658, 682 (10th Cir. 2002) (noting need to ensure that defendant was apprised of the nature, role, and importance of mitigating evidence, and noting counsel's obligation to undertake an investigation to discover mitigating evidence, or to explain to the defendant why such investigation did not take place). It would be impossible, however, to advise a defendant regarding every conceivable item that could be presented in mitigation.

In the present case, Landrigan's counsel advised the court during the sentencing hearing that he told Landrigan that "in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to [the court] for consideration regarding the sentencing." (Pet. App. D at 3.) Counsel further noted that he "strongly advised" Landrigan that it was "very much against his interests to take that particular position" when Landrigan resisted efforts to present testimony from family members. (*Id.*) Based on Landrigan's statements during the sentencing hearing, his presence during counsel's discussion with the court, and based on his own affidavit submitted as part of his state post-conviction proceeding, there should be no doubt that Landrigan understood the basic concept of mitigation.

Under *Strickland*, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Here, Landrigan's counsel conducted an investigation that was adequate to explain the importance of mitigation to Landrigan. Counsel spoke with Landrigan's relatives about the need to present evidence in mitigation, and they provided him some information that could have been presented in mitigation. Counsel also consulted with a psychological expert, who interviewed Landrigan and prepared a report detailing Landrigan's mental health and family history, including his birth parents' and his adoptive parents' backgrounds and dysfunctional attributes. (J.A. at 129.) The expert's report (which was not submitted to the court at sentencing) noted in

particular that Landrigan's birth father had served time in prison and had a history of physically abusing Landrigan's mother, even trying to kill her on three occasions. Thus, Landrigan's counsel's mitigation investigation was adequate to allow him to advise Landrigan of what type of information could be presented in mitigation, and Landrigan's claim of ineffective assistance of counsel does not implicate the fundamental fairness of the process.

Moreover, as evidenced above, Landrigan's counsel intended to continue his investigation and expressed his frustration with his inability to garner additional information from Landrigan and his family to provide to other mental health experts. At the sentencing hearing, counsel indicated he had considered seeking additional time from the court to develop additional information if Landrigan were to agree to cooperate in developing evidence for consideration by other experts. (Pet. App. D at 11.)

Nothing in the record suggests that the trial court would not have granted additional time if Landrigan had agreed to cooperate. Trial counsel had already developed potential mitigation evidence that could have been presented, and the trial court allowed counsel to make a record of the type of evidence he had hoped to present, and the court expressed its willingness to consider whatever information counsel could put before it. Thus, the blame for limiting mitigation lies not with defense counsel, but with Landrigan himself.

The Ninth Circuit *en banc* opinion cites *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), in concluding that the state court's opinion was contrary to or involved an unreasonable application of clearly

established federal law. (Pet. App. A at 9-10.) However, *none* of those cases involve a situation in which the defendant affirmatively represented to the trial court that he did not want any mitigation evidence to be presented and actively undermined counsel's efforts to present mitigation. Accordingly, the state court's decision denying Landrigan's claim did not contravene clearly established federal law.

The Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence. *See Blystone*, 494 U.S. at 306 n.4 (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any ... mitigating evidence."). *Cf.*, *Wiggins*, 539 U.S. at 533 (noting that *Strickland* does not require defense counsel to present mitigating evidence at sentencing in every case). Thus, the state court's rejection of Landrigan's ineffective assistance of counsel claim, given his express waiver of presentation of mitigation, was consistent with federal law, as set forth in *Strickland* and *Blystone*. Accordingly, the state court's denial of Landrigan's claim was not an unreasonable application of this Court's clearly established law.

Furthermore, the Ninth Circuit's ruling regarding the prejudice prong of the *Strickland* analysis fails to defer to what is essentially a factual finding by the state court. *See Buckner*, 453 F.3d at 204 n.8. By characterizing as "frivolous" Landrigan's assertion that his counsel was ineffective for failing to present evidence of a genetic predisposition to violence, the state court evidenced its disbelief in Landrigan's assertion that he would have permitted counsel to present some other type of proposed mitigation evidence. That factual finding resolves the

prejudice prong of the *Strickland* analysis, because regardless of what counsel could have investigated regarding potential mitigation evidence, Landrigan would not have permitted it to be presented.

Finally, even if Landrigan's express waiver of any mitigation did not resolve the prejudice analysis under *Strickland*, the claim fails because the evidence Landrigan claims should have been presented is only marginally – if at all – mitigating.

The mitigating circumstances Landrigan faults counsel for not raising "converge" to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions. (Pet. App. A at 22 n.1.) A diagnosis of an antisocial personality disorder is not made through a blood test or a genetic screening. The diagnostic criteria, as set forth in the Diagnostic and Statistical Manual of Mental Disorders 706 (American Psychiatric Association, 4th Edition, Text Revision 2000) ("DSM-IV-TR"), are satisfied upon a showing of three or more of the following:

1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
3. impulsivity or failure to plan ahead
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults
5. reckless disregard for safety of self or others

6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations

7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Because an anti-social personality disorder is a description of conduct, the diagnosis itself is not compelling mitigation. Such a diagnosis in fact tends to confirm character traits that are not mitigating.

The Arizona Supreme Court, after citing Landrigan's comments at sentencing, stated: "The best we can say for this defendant is that he was forthright. His comments demonstrate a lack of remorse that unfavorably distinguishes him from other defendants and supports imposition of this severe penalty." (J.A. at 65.) Thus, additional evidence confirming Landrigan's negative character traits would not have been helpful.

The three-judge panel that upheld the district court's ruling correctly concluded that Landrigan's tenuous theory would not have affected the trial judge at sentencing:

> It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.

(Pet. App. B at 11-12.) Moreover, the panel aptly noted that this type of information would have shown the court that Landrigan would continue to be violent:

> He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of

> age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.

(*Id.* at 12.)

The two judges who dissented from the *en banc* ruling agreed with the panel and further noted that, under Arizona law, an antisocial personality disorder diagnosis "has often been treated on appeal as insufficient to justify mitigation," particularly when the defendant is able to control his conduct in other settings. (Pet. App. A at 23 (citing *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz. 1992))). The two dissenting *en banc* judges observed that Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. Thus, an anti-social personality disorder would not be mitigating in this case. (*Id.*)

The *en banc* majority criticized the dissenters' focus on the proposed antisocial personality disorder diagnosis, noting that "this diagnosis is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in 'disordered behavior [that] was beyond the control of Mr. Landrigan.'" (Pet. App. A, at 20 n.5.)

However, the only claim presented to the state court in Landrigan's post-conviction proceeding was that Landrigan would not have objected to one specific type of mitigating evidence being presented. Landrigan did not assert that he wanted the "full panoply" of mitigation to be presented, and he thus acknowledged that he waived presentation of anything other than evidence of a genetic predisposition to violence/anti-social behavior disorder.

Landrigan has not established either deficient performance or resulting prejudice under *Strickland*. No clearly established law from this Court establishes that counsel performed deficiently under the circumstances or that Landrigan's sentence would have been different had counsel performed differently. The additional evidence that Landrigan claims should have been developed and presented simply confirms that Landrigan is a violent sociopath. Accordingly, the state court's rejection of Landrigan's ineffective assistance of counsel claim was not objectively unreasonable and should be upheld by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit and order that Landrigan's federal habeas petition be denied with prejudice.

Respectfully submitted,

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